



# Financial Services Tribunal

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## **DECISION NO. 2016-RSA-002(b)**

In the Matter of an appeal under the *Real Estate Services Act*, S.B.C. 2004, c. 42

**BETWEEN:** Yu-Hsiang (Lester) Lin **APPELLANT**

**AND:** Real Estate Council of British Columbia and **RESPONDENTS**  
Superintendent of Real Estate

**BEFORE:** A Panel of the Financial Services Tribunal  
Patrick F. Lewis, Vice-Chair

**DATE:** Conducted by way of written submissions  
concluding on December 8, 2016

**APPEARING:** For the Appellant: Wes McMillan, Counsel  
For the Real Estate Council: Jessica S. Gossen, Counsel  
For the Superintendent: Joni Worton, Counsel

### **PRELIMINARY DECISION ON THE APPELLANT'S APPLICATION TO ADDUCE NEW EVIDENCE**

[1] By these proceedings Mr. Lin appeals a December 17, 2015 decision of the Discipline Committee ("the Committee") of the Real Estate Council of British Columbia ("Council") cancelling his licence as a real estate salesperson ("the Cancellation Order"). He now applies for an Order permitting him to adduce new evidence on the appeal.

#### **Background**

[2] On November 3, 2016 I allowed Mr. Lin's application to extend the time to file this appeal and set timelines for the delivery of submissions in connection with his expressed desire to see this tribunal admit new evidence. All parties have now provided such written submissions.

[3] Council advises that it does not object to the introduction of new evidence sought by Mr. Lin. Similarly, the Superintendent of Real Estate takes no position on the application.

[4] Mr. Lin submits that he was not provided notice of the hearing below that led to the Cancellation Order, nor of the evidence to be tendered at that hearing, and consequently did not participate in that process at all.

[5] The grounds advanced for this appeal include that Council violated principles of natural justice and procedural fairness in its investigation of Mr. Lin, and that the

Committee did so in its lack of institutional independence from Council and “the prosecutor”. On this application, Mr. Lin argues that the proposed new evidence substantially and materially bears on those questions. That evidence consists of:

- (a) transcripts of cross-examinations on affidavit of two investigators with Council, which affidavits were in the record below (Mr. Lin says that they formed the entirety of that record);
- (b) an affidavit of Mariana Warnick, a legal assistant with counsel for Mr. Lin, which appends various documents and offers brief evidence concerning a certain webpage and website; and
- (c) a transcript and translation of an audio recording made during the course of the investigation.

[6] Mr. Lin describes in his submission different ways in which these documents bear (or appear to bear) on the appeal arguments I have mentioned. The Respondents in reply have not contended the materiality of the documents.

### **Authority to Admit New Evidence**

[7] Section 242.2(8)(b) of the *Financial Institutions Act*, RSBC 1996, c. 141, confers authority on this tribunal as follows:

#### **“Practice and procedure**

#### **242.2**

...

**(8) On application by a party, the member considering the appeal may do the following:**

...

**(b) permit the introduction of evidence, oral or otherwise, if satisfied that new evidence has become available or been discovered that**

**(i) is substantial and material to the decision, and**

**(ii) did not exist at the time the original decision was made, or, did exist at that time but was not discovered and could not through the exercise of reasonable diligence have been discovered.”**

[8] Paragraph 3.15 of this tribunal’s “Practice Directives and Guidelines” tracks that statutory language.

[9] As Mr. Lin submits, this twofold statutory test bears similarity to the common law’s approach to requests that new evidence be considered on an appeal, the leading general authority in that sphere being *Palmer v. The Queen* (1979) 50 C.C.C. (2d) 193 (SCC).

## Discussion

[10] Mr. Lin submits that his application satisfies the above statutory criteria and further that it meets the applicable common law test as must be modified given the nature of the appeal.

[11] I am prepared to accept that the two branches of the statutory test are indeed satisfied here. Based on the submissions of counsel on this unopposed interlocutory motion – and without at this stage analyzing the proposed documentary evidence or predicting the role it will ultimately play, if any, on the appeal itself – I find that this evidence is substantial and material to the subject matter of the decision by the Committee, which I consider sufficient to meet the first requirement. As to the second prong of the test, and again based on the submissions made, it appears to me that the proposed new evidence either did not exist at the time of the decision below, as in the case of the transcripts of the subsequent cross-examinations, or did then exist but was not, and through reasonable diligence could not have been, discovered by Mr. Lin for the very good practical reason that he was not aware of the process that gave rise to the Cancellation Order.

[12] I am less inclined to apply the common law principles as sought. There is authority for altering the common law test for the admission of new evidence on appeal where that evidence goes to an argument attacking, not a determination made at the trial or hearing, but the validity of the trial or hearing process itself. Mr. Lin refers in this regard to *R. v. Budai* [2001] BCCA 1010, paras. 87-97, and *Ross v. British Columbia (Human Rights Tribunal)* [2009] BCJ No. 2952, paras. 26-27, and there are other authorities to similar effect. All of that, however, is of debatable relevance here because the Financial Services Tribunal, being a legislative creation, finds its authority to admit new evidence in statute rather than common law, and there is no indication on the face of the statute that a different approach may be taken in an appeal featuring, for example, an alleged denial of natural justice. In the absence of submissions on the question of whether there is room for application of the common law alongside or alternative to section 242.2(8)(b), which have not been made here (even by Mr. Lin), I prefer not to draw a conclusion on the point. As it happens, given my view that the motion falls within the statutory language, nor is it necessary that I do so.

[13] In the result, the three categories of evidence referred to in Mr. Lin's application may be introduced on this appeal.

“ Patrick F. Lewis ”

Patrick F. Lewis, Vice-Chair  
Financial Services Tribunal

December 9, 2016